Supreme Court, U.S.
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No. 99-1132

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ILLINOIS,
Petitioner,
v.
CHARLES MCARTHUR,
Respondent.

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, ALASKA, ARIZONA, DELAWARE, IDAHO, IOWA, MAINE, MARYLAND, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, AND WASHINGTON, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA IN SUPPORT OF PETITIONER

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STATEMENT OF AMICUS INTEREST

Like Illinois itself, Ohio and the 22 other states joining this brief serve as guardians of public order within their respective jurisdictions, and accordingly share with Illinois an obvious interest in the question presented: namely, when police have probable cause to believe certain contraband is located on particular premises, do they act reasonably under the Fourth Amendment if they secure the premises from the outside and prevent anyone from entering, including the owner or occupant, during the time it takes to obtain the search warrant? This question implicates the basic balance of interests between the State's law enforcement power and the citizen's privacy. Accordingly, the amici States urge a ruling that accords appropriate latitude to the discretion of police officers – a discretion that permits them to enforce the law while respecting the fundamental rights of the citizenry.

SUMMARY OF ARGUMENT

The Fourth Amendment principles at stake here present no study in black-and-white absolutes, but operate in a gray zone that lies at the margins of established doctrine, and that necessitates striking a proper balance between individual liberty and society's interest in law enforcement. *First*, there is the requirement that officers obtain search warrants, which reflects the important constitutional policy that police intrusions be subject to *ex ante* judicial oversight. In this case, that requirement kept the officer from conducting an immediate search that would have uncovered the very drugs and paraphernalia his wife had informed the police about. *Second*, there is the need to prevent destruction of evidence at the scene once police contact has been justifiably initiated. Under these circumstances, the officer chose a less intrusive means: instead of immediate search, or immediate arrest of McArthur, the officer

seized – or "impounded" – the premises. This "impoundment alternative" deserves attention as "a way to deal with the loss-of-evidence risk which does not necessitate, on the one hand, warrantless searches or, on the other, arrest of all those present." 3 W. LaFave, Search and Seizure: A Treatise On The Fourth Amendment §6.5(c), at 361 (1996 & Supp. 2000).

For this reason, the Court should analyze the temporary impoundment of McArthur's domicile under a balancing test that measures the degree of the officer's intrusion upon McArthur's possessory interests against the public need to preserve evidence whenever probable cause supports the belief that contraband is located on the premises. The relatively strong degree of proof possessed by police – here, probable cause rather than mere suspicion – should weigh heavily in favor of the public interest, with one decisive factor being the speed in obtaining and executing a search warrant so as to minimize the duration of the warrantless impoundment.

The amici States also urge that the officer's original request for consent to the search did not offend against any Fourth Amendment principles, even though that request itself may have helped create McArthur's motive to destroy evidence, which in turn constitutes the reason for impounding the premises. Using the request for consent as a factor weighing against the public interest would discourage officers from affording citizens an opportunity to cooperate without formal judicial determination of probable cause – something a citizen might legitimately desire to avoid.

In sum, the amici States ask the Court to acknowledge that, absent a showing of objective bad faith on the part of officers, the existence of probable cause to believe contraband is located on the premises permits a suitably short impoundment of those premises – even securing a domicile against entry by the owner or

occupant – during the time a search warrant is being obtained.

ARGUMENT

A. While waiting for a warrant, the police may control access to a dwelling – even to the point of denying entry to the owner or occupant – in order to prevent the destruction of evidence.

This case involves marijuana and paraphernalia discovered pursuant to a search warrant that issued upon probable cause; that much is not in dispute. Jt. App. 23; Pet. App. 1-2. What the parties contest is a preceding event: during the time the police took to obtain the search warrant, an officer prevented the owner and occupant of the premises, the defendant McArthur, from entering without supervision.

The Illinois Appellate Court described this action as "constructive eviction" of McArthur, Pet. App. 12, and apparently on those grounds plus the officer's entry treated it as an "unreasonable seizure." Pet. App. 13. But the court went on to note the complications in its ruling. Unlike a typical arrest, "[i]t appears that during the time police secured his residence defendant was free to go anywhere in the world except back into this trailer by himself." Pet. App. 14. Accordingly, the court said the "securing of defendant's residence under these circumstances may have included an unreasonable seizure of defendant's person," *id.*, but continued to entertain doubt in that regard. Its conclusion was predicated upon the "constructive eviction" concept and the warrantless intrusion on McArthur's "possessory interests" in his own domicile, see discussion, Pet. App. 4-5 (noting that a "seizure affects an individual's possessory interests while a search affects his privacy interests").

Thus, in spite of some contrary indications, the state court boldly proclaimed its basic finding that the premises, rather than the person, had been seized. We take the appellate court at its word, and we think that view is correct.

By its literal terms, the Fourth Amendment guarantees the "right of the people to be free in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Expressed in the original language, the seizure was not one of McArthur's "person," but rather of his "house." The state court's "constructive eviction" theory focuses on seizure of the "house" while acknowledging as well the ancillary imposition upon the "person." One model for such analysis lies in this Court's decisions dealing, not with "person" or "house" directly, but with "effects," *see United States v. Chadwick*, 433 U.S. 1, 12 (1977) (acknowledging automobiles and luggage are "effects" under Fourth Amendment).

Where the Court has imposed a search-warrant requirement before luggage may be searched, the Court has expressed approval of the temporary impoundment necessary to preserve evidence while the warrant is obtained. *See Chadwick, supra; Arkansas v. Sanders*, 442 U.S. 753 (1979); *cf. California v. Acevedo*, 500 U.S. 565 (1991) (overruling the *Chadwick/Sanders* Court's application of warrant requirement). Indeed, the Court has gone so far as to recognize that reasonable suspicion can, in a proper case, form the basis for a very brief detention of "effects" to facilitate further investigation, *see United States v. Place*, 462 U.S. 696 (1983).

1. The need to obtain a warrant to search a dwelling justifies securing the premises to prevent destruction of evidence during the brief time it takes to obtain the warrant.

Typically, the propriety of seizing items has been discussed in the context of answering the question whether a warrant was required to search. Thus, in *Chadwick*, the Court held that the prerogative to stop and search an automobile without warrant did not extend to searching a locked footlocker within the automobile in the absence of a search warrant pertaining to the locker. In *Sanders*, the Court held that even though a suitcase had been properly seized from the trunk of a car in connection with an arrest given probable cause to believe contraband was contained, no search of it could take place without a warrant. (This result was overruled in *California v. Acevedo*, 500 U.S. 565 (1991), but the logic of permitting impoundment in order to have time to secure a warrant remains the same whenever a warrant is required.)

As the Court applied the search-warrant requirement in those cases, increasing attention was given to the propriety of seizing an item in order to have time to obtain the requisite warrant. In *Chadwick*, the Court noted that "[t]he initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." 433 U.S. at 13. In a footnote, the Court distinguished the interests invaded by seizure as opposed to search: since the defendants' "principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents" the Court opined that a "search of the interior was [] a far greater intrusion into Fourth

Amendment values than the impoundment of the footlocker." *Id.*, n.8.

By the time *Sanders* was decided, the Court's words concerning pre-search impoundment expressed outright approval: "The police acted *properly* – indeed *commendably* – in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marihuana." 442 U.S. at 761 (emphasis added). The judicial commendation for seizing the suitcase arose from the need to secure it until a search warrant was obtained.

Subsequently, the Court has limited the warrant requirement for luggage in a mobile automobile, *see California v. Acevedo*, 500 U.S. 565 (1991), but that does not change the logic of permitting impoundments where a search warrant is required. *See Mincey v. Arizona*, 437 U.S. 385 (1978) (affirming warrant requirement for extensive search of suspect's dwelling in spite of arrest); *Vale v. Louisiana*, 399 U.S. 30 (1970).

Despite its finding against the government on the facts of the case, *United States v. Place*, *supra*, fully supports the basic premise that temporary impoundment can be justified, and in no way impugns the reasonableness of impounding for one to two hours in order to obtain a warrant where police have probable cause. In *Place*, the overriding factor lies in the fact that police acted not upon probable cause, but upon the very much lesser quantum of "reasonable suspicion," 462 U.S. at 701, 702 ("[w]here law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it..." but "[i]n this case, the Government asks us to recognize the reasonableness

under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause...").

Given the low quantum of suspicion in *Place*, the police needed to investigate further to determine whether there would be probable cause. The 90 minute detention of luggage was unreasonable under those circumstances. But that says nothing about the length of time necessary to get a warrant, once the police do possess probable cause – as they did beyond dispute in the present case.

Moreover, the purpose behind making an owner wait before restoring his or her possessory rights has a bearing on the length of time the owner can be asked to wait. In *Place*, the police detained the luggage in order to vindicate the *public interest* in investigating further – they wanted to see if they could establish probable cause, and after that (only if there were probable cause) they could apply for a warrant. But in this case, by contrast, the police already had probable cause, and McArthur suffered a one to two hour interference with his possessory rights so that the police could carry out the constitutional policy of protecting *McArthur's own right* to have a magistrate make an independent ruling on the existence of probable cause.

The cases involving impoundment of luggage set the stage for *Segura v. United States*, 468 U.S. 796 (1984), where the police impounded a dwelling "from the inside" for 19 hours until a search warrant was obtained and executed. In that case, officers arrested one person who jointly occupied an apartment with another. Then, the officers entered the apartment, announced to others there that Segura was under arrest, performed a limited security check, arrested the other occupant, and remained for some 19 hours until a warrant was finally obtained. Execution of the warrant revealed some contraband, which formed a basis for conviction.

Suppression was sought on account of illegal entry and security check. The Court did not review the finding that the entry was illegal, 468 U.S. at 798; nor was review sought of the lower court rulings suppressing the items discovered "in plain view" during the security check, 468 U.S. at 802 n.4. But the Court split on admissibility of evidence discovered pursuant to the search warrant; a 5 to 4 majority declined to view those items as "fruit of a poisonous tree."

Most directly pertinent here is Part IV of Chief Justice Burger's opinion, which was joined by Justice O'Connor. There, Chief Justice Burger opined that "the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant" and that "[w]e see no reason ... why the same principle ... should not apply where a dwelling is involved," 468 U.S. at 806, 810 (opinion of Burger, C.J., joined by O'Connor, J.). The dissenting opinion thought the illegal entry tainted the subsequent searches and would have applied the exclusionary rule more broadly, but the four dissenting Justices endorsed the assumption that "impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside' – when the authorities merely seal off premises pending the issuance of a warrant but do not enter," 468 U.S. at 824 n.15 (opinion of Stevens, J., dissenting, joined by Brennan, Marshall, Blackmun, JJ.). Thus, a majority of Justices (and possibly all the justices, *see* LaFave, *supra*, at 366) appeared to favor an "external impoundment" of the type presented in this case.

That is not surprising given the reasoning of the luggage cases. The pedigree of the *Segura* opinions firmly roots the justification for temporary seizure of "effects" – and by extension "houses" – in the need to preserve evidence without authorizing warrantless searches.

Indeed, the support of the dissenters in *Segura* for the more unqualified pronouncement that impoundment "from the outside" may be justified even "absent exigent circumstances" appears closely associated with their emphasis on the fact that, with an "internal" seizure of a dwelling, not only possessory interests, but also "privacy interests were unreasonably infringed by the agents' prolonged occupation of their home." 468 U.S. at 821-22 (opinion of Stevens, J., dissenting, joined by Brennan, Marshall, Blackmun, JJ.). "External" impoundment, by contrast, in no way constitutes a similar invasion of the private sphere inside the home.

The record in this case shows the officer did enter during the impoundment, but only for the limited purpose of supervising McArthur who had requested permission to enter himself. Jt. App. 22, 26-27, 28. No search was conducted during such entry, and the contraband was subsequently found pursuant to warrant, so that, under the clear holding of *Segura*, no exclusionary rule attached to the fruits of the warranted search. Moreover, to the extent the impoundment itself was reasonable, the officer must have had discretion to condition any entry by McArthur on the amount of supervision that would be necessary to achieve the purpose of the impoundment, i.e. to prevent destruction of evidence. Thus, the Illinois court erred, Pet. App. 12: no "internal" impoundment occurred. The officer did not force entry; he conditionally authorized McArthur's re-entry after effecting a valid "external" impoundment.

To sum up: the warrantless search (and arguably also an "internal" impoundment of premises) invades sacrosanct privacy interests that enjoy Fourth Amendment primacy. By contrast, a brief seizure of items or premises pending issuance of a search warrant effects a lesser intrusion upon merely possessory interests. The Fourth Amendment policies underlying the warrant requirement, therefore, are well served by acknowledging

police discretion to effect a warrantless impoundment, from the outside, of premises during the time it takes to obtain the search warrant.

2. Fourth Amendment standards furnish fully adequate safeguards against any dangers inhering in temporary warrantless seizures of "effects" or "houses."

Two related concerns inhere in a warrantless impoundment. First, the seizure of premises to the point where one may not enter one's own domicile constitutes an intrusion that may be greater or lesser in a given case, and arguably constitutes a more significant intrusion than many situations where, for example, luggage is seized. Second, and closely related, is the effect of coercive police conduct on the homeowner's willingness to consent to a search – the very intrusion of being barred from one's home could conceivably induce a consent to search otherwise not forthcoming. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (when "the State attempts to justify a search on the basis of [] consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied").

The discussion in *Place*, *supra*, allays these concerns. In that case, the Court acknowledged that, subject to the balancing test for reasonableness, brief seizures of items could occur based upon mere reasonable suspicion, 462 U.S. at 706; but the Court held that the bounds of any such police prerogative had been transgressed under the facts of the case. The Court cited two circumstances of particular importance, both of which could also become significant in a given case even if probable cause were present. The first circumstance was the 90 minute duration of the seizure of luggage; that, the

Court found, was simply out of all proportion to the quantum of basis for suspicion and the genuine needs of police investigation. 462 U.S. at 709-10. The second significant circumstance lay in the officers' failure to communicate with the suspect: "[T]he violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and to what arrangements would be made for return of the luggage if investigation dispelled the suspicion." 462 U.S. at 710. *Cf. City of West Covina v. Perkins*, 119 S.Ct. 678, 681-82 (1999) (acknowledging situations in which due process requires individualized notice of seizure).

Both the durational standard and the communication element potentially shield citizens against police abuse of a power to effect warrantless impoundments. Here, the police acted not upon mere reasonable suspicion, but upon probable cause, and nothing in the record indicates the one to two hours during which the warrant was procured should by itself be deemed unreasonable. Nor does the record whisper any suggestion that the impoundment was abused by officers; in particular, the officers did not use it to extract a consent for the search, or to inflict any detriment upon McArthur beyond the wait necessary to obtain the warrant. Thus, the present case presents neither a hypothetical situation where police delay in getting a warrant to prolong the intrusive character of impoundment; nor one where police lie about the status of the warrant application, or omit to tell a suspect that a warrant application has been delayed or denied.

Such ancillary Fourth Amendment standards fully suffice to guard against any police abuse of a power to impound.

3. No right to destroy evidence inheres in the concept of ordered liberty.

Nor should the Court lose sight of the anomaly in McArthur's claim, which goes like this: "Because I would have destroyed the evidence if permitted to enter alone, Jt. App. 27, that evidence would never have been discovered pursuant to the search warrant; therefore, the evidence, having been preserved by the officer's impoundment of the premises, should now be suppressed." The Court should reject this assertion.

The Fourth Amendment to the U.S. Constitution articulates rights which this Court has held to be incorporated into the due process guarantee set forth in Section 1 of the Fourteenth Amendment: "The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

Given the strictures of the warrant requirement, officers will in the absence of a power to impound, lack reasonable power to prevent the destruction of evidence. We respectfully submit that such a doctrine in no way inheres in the concept of ordered liberty, and therefore cannot properly be enforced against the States under the Fourteenth Amendment incorporation doctrine.

B. The officer acted reasonably in initially requesting consent to search.

Although the testimony is not clear, a plausible reading indicates McArthur may not have been aware that his wife informed police concerning his possession of

marijuana until the officer told him so and requested consent to search. Jt. App. 26. If that is correct, then the officer may have alerted McArthur and helped create the motive to destroy evidence. Jt. App. 16, 26. Such a reading of the record raises a potential concern that the officer helped create the very circumstance that justified the impoundment. But that concern does not justify ruling the impoundment unconstitutional, because that would, in effect, deprive police of discretion to request consent.

Not only has the Court identified no constitutional policy that disfavors consent, the Court has endorsed consent searches. "[I]n those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable," and "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution a prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 243 (1973); cited with approval in *Florida v. Jimeno*, 500 U.S. 248, 252 (1991); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) ("nothing constitutionally suspect in the existence, without more, of [] incentives to full disclosure or active cooperation with the police"). Nor is consent always a detriment to the suspect, who may find a "search pursuant to consent" involves "considerably less inconvenience," because "[i]f a search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified." *Schneckloth*, 412 U.S. at 228.

Here again, the power to impound must be considered in light of the strong and vital rule that police should obtain warrants before undertaking a Fourth

Amendment search. Should the exigency created by an officer's requesting consent justify a warrantless search? The obvious danger is complete vitiation of the warrant requirement, *see*, *Kansas v. Schur*, 538 P.2d 689 (Kan. 1975) (where prosecution predicated claim of "exigent circumstances" upon defendant's negative response to officer's request for consent, court concluded that "if any exigency existed it was created by the acts of the officer"). Temporary impoundment, by contrast, preserves both the warrant requirement and the interest of both suspect and society in consent searches.

CONCLUSION

For all the foregoing reasons, the decision of the Illinois Appellate Court should be reversed.

Respectfully submitted,

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